

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

21-CR-080 (NGG)

3 UNITED STATES OF AMERICA,

United States Courthouse
4 Plaintiff, Brooklyn, New York

5 -against-

October 26, 2022
6 DOUGLASS MACKEY,
7 Defendant.

1:30 p.m.

8

9 TRANSCRIPT OF CRIMINAL CAUSE FOR ORAL ARGUMENT
10 BEFORE THE HONORABLE NICHOLAS G. GARAUFIS
11 UNITED STATES SENIOR DISTRICT JUDGE

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1 (In open court.)

2 (All rise.)

3 THE COURTROOM DEPUTY: Criminal cause for oral
4 argument. Beginning with the government please state your
5 appearances for the record.

6 MR. PAULSEN: For the government, Your Honor, Erik
7 Paulsen for the United States Government. I'm joined by
8 William Gullotta and Turner Buford.

9 THE COURT: Good afternoon.

10 MR. FRISCH: And for Mr. Mackey, Andrew Frisch, Your
11 Honor, good afternoon. And Mr. Mackey is present.

12 THE COURT: Good afternoon.

13 Good afternoon, Mr. Mackey.

14 Okay, please be seated everybody.

15 This is an -- this is oral argument on the defense
16 motion to dismiss, and so we'll begin -- we'll begin with
17 Mr. Frisch.

18 MR. FRISCH: Your Honor, thank you.

19 There's a lot of things about this case that are
20 atypical, but there are three things that I think are
21 especially atypical as it relates to Mr. Mackey's motion to
22 dismiss.

23 First. Unlike the lion's share of cases that talk
24 about venue, this Court ordered particulars on venue.

25 Second. The government's responsive particulars

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1 fall short of every test for venue, every analysis that has
2 ever been articulated to assure the bar from the Supreme Court
3 that venue is narrowly construed. Whether we talk about
4 whether the conduct here qualifies as substantial, whether we
5 talk about whether the criminal statute's essential conduct is
6 committed in this district as opposed to ancillary
7 circumstances, the government's responsive particulars fall
8 short.

9 And here's the third thing which I -- which is that
10 we're assessing venue on unprecedented application of
11 Section 241. And so, Your Honor, I think, well, what's the
12 relevance of 241 to the argument on venue, and it's this:

13 That because of the very nature of crimes like wire
14 fraud and mail fraud and securities fraud and violation of the
15 Hobbs Act, racketeering, distribution of contraband, the very
16 nature of these crimes typically favor permitting the
17 government to shoot its shot on venue because of the broad
18 concepts at issue, commerce, fraud, distribution, things of
19 that nature.

20 And so over the course of time, because of the
21 breadth of those concepts and the history and the practice of
22 how they've been applied, the government has earned deference
23 to be entitled to go to trial when those kinds of concepts are
24 played.

25 But this case is different. The government somehow

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1 finds room to argue that Mr. Mackey was on fair notice that
2 the alleged conduct was criminal when Senators Schumer and
3 Gillibrand and Klobuchar and Cardin and Obama, when he was a
4 senator, Ms. Clinton, when she was a senator, and all the --
5 and others have supported legislation precisely because they
6 don't believe conduct worse than this is covered.

7 And so under these circumstances where the crime --
8 the statutory crime is just a conspiracy, the crime is
9 complete when the conspiracy is consummated and no part of
10 that happened in this district, the government is not entitled
11 to the deference that it's entitled to more broad concepts
12 that engage in more typical cases based on commerce or
13 distribution or wire, mail and fraud, it's wire, mail and
14 securities fraud. They haven't earned that deference here.
15 Here, venue needs to be narrowly construed and it doesn't
16 exist here.

17 The government's theory essentially is that there is
18 universal venue when there's something like a tweet, but
19 that's not the law and there's no support for that. There
20 needs to be substantial conduct or the essential -- the
21 essential element committed in this district.

22 THE COURT: Well, let me -- I understand that
23 argument.

24 Let me ask the government. Starting with the
25 essential conduct test, what do you think the essential

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1 conduct elements identified in Section 241 that would apply to
2 this case?

3 MR. PAULSEN: So, Your Honor, the government would
4 allege that the essential conduct here was a scheme to
5 distribute misinformation about how people could cast their
6 vote. And so in this case, the government has several venue
7 arguments.

8 The first is that the tweets that were sent by this
9 defendant were sent electronically through the Eastern
10 District of New York as an act in furtherance of that scheme.

11 THE COURT: And they were sent -- you're saying you
12 would prove at trial to the jury that they were sent through
13 the Eastern District of New York electronically?

14 MR. PAULSEN: Yes, Your Honor.

15 As we mentioned in our brief, in the course of a
16 conspiracy, Second Circuit law states that an electronic
17 communication that's sent in furtherance of the conspiracy,
18 which passes through a district like the EDNY, does give you
19 venue.

20 In this particular case, the evidence indicates,
21 which we would need to prove by a preponderance for venue,
22 that Mr. Mackey was in Manhattan at the time, that the Twitter
23 servers that received the tweets and then processed them and
24 sent them back to the larger world, were on the other side of
25 the country, and those tweets would have had to pass through

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1 the EDNY. That is one of the four arguments that we would
2 make.

3 And so I don't believe that's an extension of any
4 particular novel venue argument. The cases are legion in this
5 courtroom where venue is predicated on a relevant wire
6 communication or electronic communication or a wire of money
7 or some act in furtherance of a conspiracy that passes through
8 EDNY.

9 THE COURT: All right. Thank you.

10 Yes, go ahead.

11 MR. FRISCH: Cases are legion where commerce is at
12 issue, or distribution is at issue, or one of the more typical
13 statutory definitions with which we deal. That's where you
14 can argue that the phone call from point A to point B or a
15 communication from point A to point B or receiving some
16 contraband in a far away place bestows venue in that far away
17 place because it's commerce or it's the effect of a wire, mail
18 or securities fraud or it's the distribution of contraband
19 that's -- distribution of contraband. That's not this case.

20 This case isn't --

21 THE COURT: I understand that's not this case.

22 This case is about a tweet that was distributed, I
23 assume widely, that instructs the recipient of the tweet that
24 that individual can avoid the inconvenience of going to the
25 local polling place and can vote from home by texting Hillary

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1 at 2 -- at 59925.

2 Now that's -- that's -- we're dealing here not with
3 commerce, we're dealing here with a basic constitutional right
4 that is being affected, potentially, by these tweets. And
5 tweets, you know, we're not around in 1870 when Congress
6 passed the Ku Klux Klan Act.

7 You know, we have to identify whether venue's proper
8 in 2022 regarding an activity, the right to vote, that is here
9 and now.

10 So, you know, you can make the argument that, you
11 know, it's the -- that there are all kinds of rights that are
12 attached to Congress. But this isn't Congress, I grant you.
13 This isn't Congress. This is something else.

14 But this is something even more critical than
15 Congress. And the purpose of this, allegedly, was to affect
16 Hillary Clinton's election and it was distributed the day
17 before the election.

18 So there's no doubt that this was not -- this meme
19 was -- it would seem, at least they'll try to prove -- that
20 the government will try to prove, this meme was not a -- was
21 not a joke. It wasn't made in -- to be humorous. That it was
22 intended to be a way of lowering Hillary Clinton's numbers on
23 Election Day.

24 Is there any other -- is there any other explanation
25 for the -- for the appearance of this on that schedule?

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1 MR. FRISCH: Well, if I might, Your Honor.

2 Your Honor's question has three answers to it.

3 The venue answer, the 241 answer, and then whether
4 there's another interpretation of what's intended by the
5 memes.

6 Let me take them each at -- each one at a time.

7 THE COURT: Sure.

8 MR. FRISCH: Now matter how -- we can agree that all
9 constitutional rights that are arguably covered by Section 241
10 are important. That's why they're constitutional rights.

11 But that doesn't mean there's universal venue in
12 every -- in every hamlet and state, for example, because an
13 electronic communication went from the place where the
14 conspirators are someplace else absent more. That by itself
15 establishes there's no essential conduct in the Eastern
16 District of New York because --

17 THE COURT: Why is that? Wouldn't that be a
18 question to ask the jury to decide in the first instance if
19 the jury found that there was -- that your argument was
20 correct by a preponderance of the evidence, the case would be
21 over.

22 MR. FRISCH: Yes, that is correct, and I think the
23 difficulty on the venue argument or perhaps the difficulty in
24 ruling on this part of the motion is that typically we give
25 the government the opportunity to go to trial and see if they

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1 can prove it.

2 The problem with that here is that we know what
3 their proof is by virtue of the particulars. We know there's
4 no essential conduct, and how do we know that? Because the
5 statutory definition, it's a conspiracy. That's the essential
6 conduct test. We know that's not passed. That's not met,
7 because the essential conduct is the conspiracy. There may be
8 some other things that happened, but that doesn't bring it
9 within the essential conduct test. So that brings us to the
10 substantial context test -- contact test.

11 This is not substantial. And the one case that
12 addressed an anomalous situation is *Auernheimer*, which I'll
13 spell later for the court reporter, from the Third Circuit,
14 where while the Third Circuit doesn't apply the substantial
15 contact test, they -- they applied it to electronic
16 communications and said under the particular statutes there,
17 the crime was committed somewhere, even though the crime
18 reached into, I think it was the District of New Jersey, and
19 captured electronic information. That was ancillary. It was
20 insubstantial.

21 If there's a substantial contact test, by
22 definition, there has to be -- there has to be a place where
23 there are contacts in the context of the case that are
24 insubstantial. And when you have a statute, the essential
25 conduct of which is a conspiracy without regard to what

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1 happens thereafter --

2 THE COURT: Well, you're entering the conspiracy at
3 the time that the actor or actors pressed the button and sent.
4 The conspiracy -- you know, it's a convenient way of
5 circumscribing the conspiracy to a moment in time. And I'm
6 not sure this Court is going to be able to reach that
7 conclusion in this case.

8 But -- and I'm not sure that I would agree with the
9 Third Circuit, nor am I obligated to agree with the Third
10 Circuit, so I just point that out.

11 MR. FRISCH: I understand Your Honor's point, and
12 what I would say to it is that it's not a question of whether
13 I'm truncating or restricting the conspiracy, it's whether
14 what happens, the receipt of a tweet in Brooklyn, is essential
15 conduct within the statutory definition of the crime.

16 I grant you things can happen that are arguably part
17 of the conspiracy. But the essential conduct test looks at
18 the statutory definition and says, is this essential to
19 proving the crime or is it ancillary? And if it's ancillary,
20 it may well be, as Your Honor says, part of the conspiracy,
21 maybe proof of the conspiracy. It's simply not essential to
22 prove how the crime is -- is defined, and the words of the
23 crime.

24 THE COURT: There's also case law that I think has
25 been brought to my attention that a third party acting on the

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1 conspiracy, you know, is a part of the conspiracy, even
2 though -- and not an intended part of the conspiracy, it still
3 is part of the conspiracy.

4 I'm not saying I ascribe to that, but I think that's
5 the argument that's being made.

6 Let me just hear from the government on this issue.

7 MR. PAULSEN: Yes, Your Honor.

8 THE COURT: And then I want to move on --

9 MR. PAULSEN: Sure.

10 THE COURT: -- because we have plenty to talk about.

11 MR. PAULSEN: Your Honor, as an initial matter, as
12 we mentioned in footnote 12 in our brief, the Second Circuit
13 has said the essential contact test does not have to be
14 applied when there's an act in furtherance of a conspiracy to
15 touch the district. I'm not sure that needs to be addressed
16 here.

17 But I think it's worth stating that the acts in
18 furtherance that we are saying passed through the EDNY are not
19 incidental parts of the scheme. They are the tweets in
20 question that have the misinformation. And as Your Honor
21 points out, the government will allege that the purpose was
22 for that information to be forwarded onward and forwarded
23 onwards such that it would reach more people.

24 The conspiracy doesn't end at the moment that he
25 sends that. The whole point of the conspiracy is that

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1 information like this goes viral, gets spread, and so we would
2 say this is essential conduct to the conspiracy.

3 I would just add, Your Honor, I know Your Honor
4 wants to move off of venue, but the government has not tried
5 to put all its eggs in one basket. On this matter we do
6 allege other avenues that we believe venue could be upheld.
7 One of them is the issue Your Honor just mentioned that if --
8 if the -- this information is spread with the expectation that
9 innocent third parties will find it and forward it onwards,
10 that could be an act in furtherance of the conspiracy. Also,
11 case law is fairly clear that the receipt of information like
12 this, if that's what's intended, can grant venue as well.

13 And, Your Honor, we do make, I wouldn't call it a
14 universal venue argument, but in a situation like this, I
15 think it bears repeating that -- you mentioned a moment ago
16 that when the Ku Klux Klan Act was written Twitter didn't
17 exist, the internet didn't exist, telephones didn't exist.

18 This courthouse has seen cases where fraudulent
19 materials are sent out to -- by phone to various different
20 districts, 15, 20 districts, and the court and the Second
21 Circuit afterwards would hold that venue is appropriate in any
22 of them because they availed themselves of those many
23 districts.

24 We are in a unique spot where if the government's
25 allegations are true, which is -- would be held to be true for

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1 this motion, if a scheme's intent is to spread something
2 everywhere, it strikes us that the defendant should reap what
3 he sows when it comes to venue. And then I don't think it's
4 necessary for this case necessarily, because I think we have
5 other grounds for venue.

6 (Court reporter interrupts for clarification.)

7 MR. PAULSEN: I wrote "slow" on my pad and I'm not
8 listening to myself.

9 But in a situation like this where the point was to
10 spread it everywhere, there's something odd to say that
11 despite wanting it to go everywhere, they are only subject to
12 venue in one spot. The venue does not befit the aspirations
13 of the crime.

14 THE COURT: I'll give you the last word on venue.

15 MR. FRISCH: There's a reason why the Supreme Court
16 says that -- the one thing that hasn't changed over the last
17 150 years, if I have done my math right, I think that's right,
18 is that venue needs to be narrowly construed and it needs to
19 be focused on where the conduct occurred.

20 There is no such thing as universal venue,
21 especially on a statute which doesn't have commerce, it's the
22 conspiracy. The conspiracy that happened here, the fact that
23 a tweet found its way to Brooklyn or Nassau or Suffolk is not
24 enough to create substantial, and certainly not essential
25 under the definition of the statute, and it is certainly not

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1 substantial.

2 THE COURT: Well, I'm not sure that the Supreme
3 Court, if it had a case such as this, would find one way or
4 another in the electronic age of how to reform venue or to
5 define venue in a broader context. But it is clear that the
6 reach of the internet is so broad that the effects of
7 communicating by Twitter, for instance, can be extremely -- it
8 can also be extremely widespread.

9 So we're sort of in the new age. And we have to
10 bear that in mind, and in a sense this is a case of first
11 impression, I think, in some ways, and I'll just grapple with
12 all these issues and do my very best. Okay?

13 Can we go on?

14 MR. FRISCH: We can go on to the next issue. I'm
15 going to -- I am going to piggyback on something Your Honor
16 just said as I go into the next issue, which is the new age
17 concept.

18 THE COURT: I'm not sure the Supreme Court will be
19 interested in new age issues.

20 MR. FRISCH: Well, they might on this one, on this
21 next issue, and the reason I --

22 THE COURT: Oh, you are now going into the next
23 issue, you are now moving on?

24 MR. FRISCH: I was trying to make a clever segue,
25 but I --

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1 THE COURT: All right. Well, you've done enough, go
2 ahead.

3 MR. FRISCH: It wasn't smooth. But I am going to
4 try -- I'm going to press forward.

5 Here's what we know: Congress doesn't believe that
6 conduct worse than this is covered by the existing language of
7 241. This goes to the fair notice, fair warning to Mr. Mackey
8 about the alleged conduct.

9 It seems incongruous -- it seems incongruous that
10 the government says that Mr. Mackey was on fair notice and
11 fair warning that these alleged retweets are within the scope
12 of 241 when far more serious, what I'll call for purposes of
13 today, alleged misinformation are expressly cited by Congress
14 and multiple senators in support of what they say is an urgent
15 need for legislation that's narrowly tailored to address the
16 First Amendment to get at this.

17 For the last 17 years, at least the last 17 years,
18 beginning with Senator Obama in 2005, Congress has continued
19 to press this deceptive practices law. It's been introduced
20 in the Senate and the House umpteen times by a variety of
21 different senators, I believe most recently Senators Klobuchar
22 and Cardin within the last two years. It doesn't pass.

23 And I think the Senate and the House and Americans
24 generally would agree that the reason why this legislation is
25 being pressed is because there's a need for a remedy. But the

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1 reason it hasn't passed is precisely because of the difficulty
2 in threading a constitutional needle through the First
3 Amendment.

4 Whatever the reason is, it's hard to argue that
5 Mr. Mackey should have seen this alleged conduct to be
6 criminally prohibited when some of the great senators of our
7 time and over the past 15, 17 years don't see it that way.

8 I also think that Congress understands that the
9 government, and I mean all three branches of government, to be
10 a steward of the marketplace of ideas, and this gets back to
11 the question that I didn't answer the first time but I'll get
12 back to it now.

13 You can look at these memes, and you can take a
14 nefarious view of them and infer an intent to dissuade or
15 mislead a certain category of voters. You can also see it as
16 satire or provocation.

17 The point is, and I think one of the reasons why
18 this legislation has been difficult to get through, is because
19 the way we do things in this country is we put these things
20 out there in the marketplace of ideas. We don't allow the
21 government, certainly not the Executive Branch and certainly
22 not the Department of Justice in a criminal case, to be the
23 ministry of decorum, absent legislations, to be sure, or the
24 ministry of truth, where crossing the line is in the eye of
25 the beholder.

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1 THE COURT: All right. You know, looking at this,
2 your argument is, in part, that this could be viewed -- this
3 communication could be viewed as satire, like The Onion, that
4 it's some sort of a satirical presentation that people would
5 not take seriously, but apparently 4900 people saw this and,
6 at least according to the government, responded the day before
7 the election.

8 And there's a question of -- there's a question of
9 the timing and the idea that this is -- might be an -- serve
10 an educational, informational function, how would this serve
11 any of those functions logically, and isn't it a question for
12 the jury to decide what function it's serving, because I think
13 a jury could look at this -- maybe you can convince the jury
14 that it was satirical, or that it was simply informational, or
15 that it was a reminder to go vote. But it is also possible
16 that a jury could find that the intent was to deceive and
17 to -- and to affect the outcome of the election in a manner
18 that was detrimental to our democratic norms.

19 I mean, I'm just wondering as someone who's actually
20 been involved in public service for a long time that the fact
21 that a few senators think that there's a -- that they need to
22 do something about this, I'm not convinced that I'm somehow
23 hamstrung because Congress can't pass a law. They can't pass
24 a lot of laws, but that doesn't mean that the rights of
25 citizens are derogated because Congress hasn't been able to

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1 put a finer point on something.

2 MR. FRISCH: Well, I think it's a question -- excuse
3 me, three things.

4 Number one, I think it's a question of fair notice.

5 The reason we're talking about Congress and these senators and
6 the urgency with which they had pressed this legislation for
7 so many years is putting aside the underlying problem which is
8 crying out for a remedy, no question about that, is that they
9 don't think it's covered. Most of them lawyers. Most of them
10 politically savvy and sophisticated. If they don't think that
11 the statute covers it, how can a citizen believe that this
12 alleged conduct is covered? How can they have fair notice and
13 have fair warning when the people who run the country and do
14 legislation don't.

15 I take your point about the different
16 interpretations of this and whether it's satire or whether
17 it's not.

18 My point is that absent legislation that's narrowly
19 tailored, the government, certainly not the Department of
20 Justice, should be the ministry of decorum or the ministry of
21 proof on that question and require a criminal defendant to
22 explain themselves.

23 THE COURT: Okay, I understand. Let me just -- let
24 me hear from the government on it.

25 MR. PAULSEN: Yes, Your Honor.

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1 I think Your Honor's correct. The fact that
2 Congress doesn't act on a thing I think does not suggest that
3 it's not illegal.

4 Senator Klobuchar, for example, on October 31st of
5 2017, about a year after the election, held a hearing on this
6 sort of conduct. She grilled the CEO of Twitter and
7 confronted a three-by-two-foot picture of one of Mr. Mackey's
8 tweets, pointed at it and said, "This is illegal." This was
9 in the context of attempting to pass additional tools that the
10 Department of Justice can use to deal with this pressing
11 issue.

12 The fact that the Congress has been consistently
13 trying to add tools to deal with this fairly baneful conduct
14 does not mean the existing tools can't reach it. Congress is
15 frequently trying to add tools such that prosecutors can reach
16 conduct that's creating a problem.

17 THE COURT: Has Congress passed -- I'm sorry. Has
18 241 been used in the context of voting cases, to your
19 knowledge?

20 MR. PAULSEN: Dozen upon dozens of times, Your
21 Honor. It's -- frankly, it's probably the core issue that 241
22 has been used for.

23 The history of 241, Your Honor, is frankly a history
24 of it being expanded to different types of voting cases,
25 whether it's confusing ballots, or people interrupting

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1 individuals trying to get to the poles, or destruction of
2 tallies. I think that's, frankly, what 241 has frankly been
3 about.

4 We've mentioned a number of these cases in our
5 brief. There's been a long line of cases starting with
6 *Yarbrough*, continuing to *Classic*, continuing to *Lanier*,
7 continuing with *Stone* before then, and *Tobin*, one of the more
8 recent ones that focus on voting.

9 Voting rights is one of the key considerations of
10 241, and I think it's relevant, Your Honor, for a fair warning
11 analysis.

12 I think some of what the defendant is doing here is
13 focusing on the means by which the conspiracy accomplished its
14 aim rather than the actual prohibition itself. I think it's
15 beyond depth that the right to vote is a
16 constitutionally-protected right, and 241 is the tool that is
17 used to prosecute conspiracies to injure that right.

18 The ways in which individuals have conspired to
19 injure those rights have changed over time, they changed over
20 a hundred years, and we now in the modern age and it's
21 changing again.

22 But the reasonable person in the United States has
23 fair notice that the right to vote is important, and that
24 efforts to infringe it, into -- oppress it to injure it are
25 prohibited. That -- the nuances and how they might do that

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1 might change is to be expected, Your Honor.

2 THE COURT: Well, all right, I think it's been well
3 briefed.

4 MR. FRISCH: Can I say one point on that --

5 THE COURT: Sure.

6 MR. FRISCH: -- if I can respond to it, and I'll be
7 brief.

8 The answer to Mr. Paulsen's argument is in the very
9 comprehensive compendium of election fraud cases put out by
10 the office to which Mr. Gullotta belongs.

11 There is not a case like this in it. There are
12 voting rights cases, but cases within 241, as it relates to
13 voting, have either language, which is intimidation, language
14 of intimidation, language of threat or physical acts, like
15 forging ballots or destruction of ballots.

16 And putting voting aside, there are cases, and the
17 government cites one, where there were false police reports.
18 It is an Eastern District of Michigan case where officers
19 created false police reports to cover up that they were
20 robbing drug dealers at gunpoint. Those things are something
21 different than mere speech, which is not threatening, not
22 intimidating, and isn't a physical act.

23 And so while Your Honor is correct to ask the
24 question whether 241 covers voting, it does. And while the
25 government is correct to point out the rich history of the

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1 application of 241 to voting, it's never been used like this
2 before.

3 THE COURT: Well, I think that the question is
4 whether a much more sophisticated approach to affect the
5 outcome of an election through fraud, that's alleged here, is
6 acceptable because there's no person standing with a gun at
7 the door of the school where the voting is taking place.

8 I think that -- you know, as I said at the
9 beginning, this statute has developed its application over the
10 years based upon changes in circumstances that could not have
11 been contemplated in 1870. And, quite frankly, looking at
12 this from the standpoint of sophistication, one could argue, I
13 think that's what the government does, the government could
14 argue that this is a far more sophisticated means of
15 unlawfully affecting the constitutional right to vote.

16 So, you know, you're saying -- the defense is
17 saying, well, Congress hasn't done anything to make it clear,
18 but the government is saying that the statute is sufficient to
19 handle this type of nuance approach to manipulating, you know,
20 the system of voting, which is a constitutional right.

21 I mean that's really -- that's a large part of what
22 we're discussing here.

23 MR. FRISCH: Well, if I may, Your Honor, this isn't
24 a question of the means.

25 If Mr. Mackey used electronics in some form to forge

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1 ballots, I'm certain there's a way to do that, given
2 technology these days. If he used electronics to destroy or
3 threaten or intimidate or do some of the things that plainly
4 are within Section 241's scope, he wouldn't stand on ceremony
5 and say, well, I -- I did it all electronically, therefore,
6 it's not covered. It would be covered.

7 The problem here is that it's the nature of the
8 conduct, not the means. The conduct is not previously, in
9 fact, never been applied. The statute has never been applied
10 to this kind of conduct.

11 If you look, and we cited it in our reply papers, I
12 think it's in the main brief as well, the specific examples
13 that Congress had in mind that Congress believes are not
14 covered by the statute, which are far worse than this. If
15 those things had been electronic or not, it wouldn't matter,
16 you know, giving -- saying if you come to vote, we're going to
17 arrest you for parking tickets or Republicans vote Tuesday,
18 Democrats vote Wednesday. It is not whether it's the means or
19 not, yes, the means has changed and society has to adopt to
20 different methodologies, but that's not what this is about.

21 This is about speech. Speech that's deceptive,
22 speech that's less severe or less problematic than the
23 specific examples on which Congress has not acted.

24 And, again, I understand the Court's concern about
25 the overall scope and the remedy for this, but apart from the

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1 limited scope of Section 241, what's at the heart of the -- my
2 citing to Congress, Congress and the senators, is fair notice
3 and fair warning. Because they don't believe more serious
4 conduct is covered by the statute.

5 It's hard to say that the citizen should believe
6 that a retweeted meme, however you want to interpret it, give
7 it a nefarious -- the most nefarious interpretation possible
8 or something more benign, that he or she should understand
9 that he has been fairly noticed or warned that this is
10 criminal conduct.

11 THE COURT: Anything else?

12 MR. PAULSEN: Your Honor, I addressed the fair
13 warning a moment ago, so I'll leave that as it is.

14 I would just note that I think the speech issue is a
15 bit of a red herring here. Supreme Court case law is very
16 clear that when speech is used in service of a criminal act,
17 it doesn't get that same First Amendment protection.

18 When somebody sends out a scam, charitable flier
19 saying please donate to my charity but then takes the money,
20 even if they are commenting on political issues, that false
21 statement is -- is -- the government will criminalize it.

22 There's a very well-known Supreme Court case,
23 *Giboney*, which -- it's 336 U.S. 490, it's often cited for this
24 point. It's a -- an old antitrust case in which during a
25 union fighting, one of the sides had picketers block the

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1 company. They -- free association that you would normally say
2 is protected speech. But it was done in service of a scheme
3 to interrupt and violate an antitrust law. And what the
4 Supreme Court says in that case:

5 "It has rarely been suggested that the
6 constitutional freedom for speech and press extends its
7 immunity to speech or writing used as an integral part of
8 conduct in violation of a valid criminal statute. We reject
9 the contention now."

10 It's always been the case that speech that is used
11 to effectuate a criminal plan like this doesn't get covered.
12 That's why 1001 exists. That's why perjury exists. It's why
13 false statements laws exist. It's why when somebody fills out
14 a form inaccurately to the government that doesn't count as
15 First Amendment. That's why fraud cases and deceit cases
16 generally can be prosecuted. This is a red hearing.

17 THE COURT: All right, let's go on to the
18 First Amendment.

19 MR. FRISCH: Can I just -- I think I just -- if Your
20 Honor would just permit me just to respond briefly to that. I
21 won't -- I won't belabor it.

22 THE COURT: Go ahead.

23 MR. FRISCH: But the government is mixing apples
24 oranges and bananas. There are certain types of speech that
25 are not permitted. If it's commercial speech. If it's based

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1 on defrauding people financially. If it's based on commerce.
2 There's -- if it's obscene. If it's bribery.

3 There are number of examples. If it's a 1001
4 violation, which the government cites. There are a number of
5 ways in which that kind of speech is not permissible and can
6 be criminal.

7 But this, this information in the context of
8 politics, whether you --

9 THE COURT: It's not politics. Let me start with
10 this. If proven, defrauding individuals of their
11 constitutional vote, it's not politics. Whoever they want to
12 vote for, is not politics. That's their business.

13 If the speech, you know, misstates a person's
14 views -- a politician's views and is, you know, a part of the
15 discourse. But what is alleged here is that the, quote,
16 speech that is contained in this meme, that has been
17 presented, is intended to -- is intended to take away an
18 individual's right to vote by conveying the impression that by
19 responding to this electronically -- to vote electronically,
20 would register a vote for that -- for, in this case, a
21 presidential candidate.

22 I mean this isn't -- you know, money is one thing,
23 but a constitutional right is more sacred than money in the
24 view of many people, including this Court.

25 So I just point that out, and I think -- you know, I

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1 don't want it to appear that the Court sanctions or would
2 agree that to deprive someone of a vote by engaging in some
3 sort of fraud would be -- would be, you know, less serious
4 than some sort of commercial speech violation. That's all I'm
5 saying to you.

6 So I don't know whether you're right or you're wrong
7 on the ultimate outcome of this issue, but the right to vote
8 is sacred. Many thousands of people have died to protect our
9 constitutional right to vote in a democratic republic. I
10 don't think there's anything more important that is done by
11 the government than securing and protecting and promoting the
12 right to vote.

13 So we'll start on that, on that lofty claim. So I
14 don't -- you know, the discussion of commercial speech, and
15 the discussion of some senators, who think that they can put a
16 finer point on something, doesn't mean that you're right, and
17 it doesn't mean that you're wrong.

18 I want to go on to the First Amendment issue.

19 MR. FRISCH: May I, Judge?

20 THE COURT: Go ahead.

21 MR. FRISCH: So the right to vote is sacred, and so
22 is the right to free speech. And the danger, notwithstanding
23 how a particular person could look at the alleged conduct
24 here, whatever it is, whether it's good, bad or indifferent,
25 accepting Your Honor's view, accepting a different view, the

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1 problem with prosecuting it criminally is it makes the
2 government, and all branches of the government, especially the
3 Department of Justice, a ministry of decorum. You know, on
4 what is pure speech, which is not independently a crime, which
5 is not independently a fraud, it's pure retweeted speech.

6 And maybe there are hypothetical situations, maybe
7 it's this one, where we can agree that this crosses the line.
8 But there could be someone else who looks at this and other
9 kinds of conduct that could be swept into this where we might
10 think it doesn't cross the line, but someone else might.

11 It's not the content, it's the right to say it. And
12 that I think is why this is such a difficult issue for
13 Americans, not just for Congress but for all of us, because
14 we're watching the news everyday, we understand what's going
15 on, is that we're trying to balance and find a way of
16 accommodating a variety of sacred rights. All of which we
17 hold here, one of which is the right to vote, one of which is
18 the right to freedom of speech.

19 While I understand the sentiments that Your Honor
20 has expressed, when we find ourselves in a criminal courtroom,
21 and someone facing jeopardy of liberty, more needs to be shown
22 about that speech than the fact that it was said. It needs to
23 be tethered to one of those other things. One of those other
24 types of speech that's prohibited.

25 As sacred as the right to vote is, the right to

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1 freedom -- the First Amendment right is also so sacred that
2 sometimes we allow things to be said in the marketplace of
3 ideas. Sometimes we allow things to be retweeted or tweeted.
4 Sometimes we allow these things because we have confidence as
5 Americans that if the debate is freely permitted to continue,
6 we'll figure it out. We'll work it out. We'll figure out
7 what's on the right side of the line and what's on the wrong
8 side of the line without resorting to criminal process, which
9 carries more risks than benefits.

10 THE COURT: Well --

11 MR. PAULSEN: Your Honor, you mentioned before the
12 importance of the right to vote. One of the cases we cite,
13 *United States versus Benson*, a case which the right to vote
14 was weighed against the First Amendment rights, it notes that
15 the right to vote is the right that secures all other rights.
16 And in that case, the right to vote triumphed over the
17 First Amendment considerations.

18 I think defense counsel mischaracterizes the nature
19 of the speech here. The government's allegations here are:
20 We are not saying that this scheme was meant to spread
21 disinformation about an issue, about policy, about a
22 politician, about anything of that sort, it's about process.
23 It is about trying to fool people out of voting, out of
24 exercising the franchise. Not the choice they make once they
25 get there, it's the actual right to vote, which is the core

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1 heartland behavior for this particular -- for this statute.

2 I think what was being alleged here fits within that
3 framework that has been prosecuted by the Department of
4 Justice for over a hundred years.

5 THE COURT: Anything else?

6 MR. FRISCH: Two points.

7 One is that this case -- a case like this has never
8 been prosecuted before. Number one.

9 Number two, I just want to correct for the record --
10 it's in the papers, I think Your Honor realizes it, but I just
11 want to state it to make sure -- that the 4900 people alleged
12 by the government are people, as I understand it, who
13 responded nationwide, I think I have that right, to the
14 retweeted meme. But there's no proof that any of them were
15 registered voters, and there's no proof that anyone failed to
16 vote as the result of believing that an anonymous text would
17 qualify as a vote for President.

18 MR. PAULSEN: And, Your Honor, I can speak to that
19 briefly.

20 We've provided information to defense counsel that
21 shows that when this tweet was sent out, and it indicated that
22 voters of a particular candidate could vote by text, various
23 individuals responded to try to put up warnings that this was
24 not actually real. And so despite the fact that people still
25 texted in and this meme bounced around the internet, shortly

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1 thereafter people got a response message saying this is --
2 this was not authorized by the campaign and things of that
3 sort.

4 The government is not prosecuting the effect of
5 this, we're prosecuting the conspiracy to do it. And the --
6 we are -- we understand our burden, and we've been, I think,
7 clear with defense counsel about what the other issue is.

8 THE COURT: Okay. Thank you very much. Very
9 interesting.

10 Thank you for coming up from Florida; is it?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right.

13 Anything else for today?

14 MR. PAULSEN: No, Your Honor. We're happy to answer
15 any questions you might have.

16 THE COURT: I think I've heard and seen and read a
17 great deal about this, and I appreciate everyone's excellent
18 briefing, and so I will let you know.

19 MR. PAULSEN: Thank you, Your Honor.

20 THE COURT: Thank you very much.

21 MR. FRISCH: Thank you, Judge.

22 MR. PAULSEN: Your Honor, my colleague did mention
23 to me, I think we had excluded time up and to this date, and
24 so... .

25 THE COURT: Time is excluded until the -- until

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1 decision, plus ten days.

2 Is that agreeable?

3 MR. FRISCH: It is, Judge, of course.

4 MR. PAULSEN: Thank you, Your Honor.

5 THE COURT: Thank you.

6 Have a nice day everybody.

7

8 (Whereupon, the matter was concluded.)

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13 I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

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s/ Linda D. Danelczyk

October 30, 2022

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LINDA D. DANELCZYK

DATE

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